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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1963

No. 336

MRS. WANDA MERCER,

Petitioner,

versus

PARIS THERIOT,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

When this case was tried to a jury, resulting in a verdict for petitioner, the district Court entered judgment in accordance therewith, without written opinion. The opinion of the United States Court of Appeals for the

Fifth Circuit, reversing the jury verdict, with directions to enter a judgment for defendant unless petitioner made a satisfactory showing that on another trial evidence of sufficient probative force warranting submission of the cause to the jury would be offered, in which case the judgment would be for a new trial, is reported at 262 F. (2d) 754 (5th Cir. 1959), certiorari denied, 360 U. S. 914 (1959). The opinion of the district Court (R. p. 230) refused to grant petitioner a new trial on the grounds that the additional evidence she submitted, ". . . while persuasive, would be inadmissible in a new trial under the hearsay rule." (R. p. 230.) The opinion of five judges of the United States Court of Appeals for the Fifth Circuit, sitting *en banc* (R. pp. 247-254), affirmed the holding of the district Court; four judges dissented, assigning written reasons (R. pp. 254-269.) The decision is reported at 316 F. (2d) 635.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit in *Mercer v. Theriot* (No. 19,068), was entered on March 14, 1963 (R. p. 270), and the order denying petitioner's petition for rehearing was entered on May 9, 1963 (R. pp. 270-271). This Court has jurisdiction under 28 U. S. C., § 1254. Certiorari was granted on November 18, 1963 (R. p. 271), 84 Sup. Ct. 264.

STATUTES INVOLVED.

1. *U. S. Constitution*, Amendment VII.
2. *Federal Rules of Civil Procedure* 43(a).

QUESTIONS PRESENTED.

1. Whether the United States Court of Appeals for the Fifth Circuit can re-examine facts found by a jury and substitute its findings for those of the jury.

2. Whether the United States Court of Appeals for the Fifth Circuit is empowered to withhold a cause from the jury when evidence has been presented from which reasonable men could draw different conclusions and inferences.

3. Whether or not evidence presented by petitioner was incompetent.

4. Whether or not the opinion of an expert witness usurps the jury's function of finding ultimate facts and is thus inadmissible.

STATEMENT.

Petitioner, Wanda Lane Mercer, and Byrd Mercer were married on May 5, 1948, and continued to reside as husband and wife up to the time of his death on December 18, 1955. (R. p. 113.) Byrd Mercer was then employed in construction work, laying a pipeline in the Gulf of Mexico, and was living with petitioner in a trailer court on Grand Isle, in the State of Louisiana, approximately four miles east of the docks where Mercer caught the boat which transported him to the job. (R. pp. 109-110.)

After arriving at the dock after work on the evening of December 18, 1955, Mercer did not ride home

with his coworkers as he customarily did (R. p. 111); he was last seen alive at approximately 7 P. M. (R. p. 111.)

Paris Theriot, the respondent, had homes in Golden Meadow, Louisiana, as well as on Grand Isle (R. p. 33), and in December of 1955 was living in his Golden Meadow home (R. p. 33). Theriot, in partnership with his brother, Leo Theriot, owned an automobile agency selling Oldsmobiles and Chevrolets. Theriot went to Grand Isle on Sunday, December 18, 1955, for the stated purpose of selling an Oldsmobile to Leo Terrebonne (R. p. 37); respondent was driving a 1955 Oldsmobile, painted white in front and red in back (R. p. 34). Theriot made a deal with Leo Terrebonne to sell him an automobile, and then went to a tavern known as Fisherman's Bar in Grand Isle. (R. p. 38.) He admitted consuming four or five drinks of Scotch and water (R. p. 38), but the bartender, Louis Bradberry, stated he served Theriot ten or fifteen Scotch and water drinks (R. p. 102).

About 7:30 P. M. respondent left Grand Isle to return to his home in Golden Meadow, traveling over Louisiana Highway 1, which is the only road on Grand Isle, going in an easterly direction. (R. p. 41.) At that time a drizzling rain was falling, and there was some fog. (R. pp. 42, 120.)

Around 7 or 7:30 A. M., on Monday, December 19, 1955, petitioner was informed that her husband had been found dead on the right shoulder of Highway 1, on Grand Isle. (R. p. 114.) The coroner's certificate, introduced in evidence, marked Plaintiff's Exhibit 2, shows that Mercer died on Grand Isle Road No. 1 about

7:30 P. M. December 18, near the Humble Oil Camp, and was thirty-two years of age, white; the final diagnosis as shown on the autopsy report of the pathologist, all as shown on Plaintiff's Exhibits 3, 3-A, 3-B and 4, indicated that the deceased died from fracture dislocation of the antlantooccipital joint with traumatic contusion of spinal cord; comminuted fracture of left tibia and fibula; partial separation of lambdoid suture of the skull; rupture of the spleen, liver and both renal arteries, laceration of scalp, face, right thigh, right hand and left leg. (R. pp. 20-21.)

At approximately 10 A. M. on December 19, 1955, Deputy Sheriff Gautreau, in charge of the investigation of this death (R. p. 27), took photographs of the scene. The body was still in the position in which it had been found (R. p. 22), on the right side of the road going in the direction of the bridge connecting the island with the mainland. (R. pp. 26, 56.) Decedent's body was some two to three feet off the edge of the pavement (R. pp. 31, 144), right next to the tire marks which ran off the road quite a way (R. p. 56). A spot of blood was observed by Officer Folse, in what appeared to be an automobile tire track, about three feet from the asphalt portion of the highway. (R. p. 144.) Mercer was wearing blue denim work clothes; his lunch pail was also found at the side of the road. (R. p. 56.)

The investigating officers proceeded to Golden Meadow, where they gave Theriot's car a careful examination. (R. pp. 27, 60, 61, 79.) Deputy Sheriff Gautreau made six pictures of the automobile, introduced in evidence and marked for identification as Gautreau 8-13.

(R. p. 25.) These photographs, together with the testimony of the officers, revealed that Theriot's car was damaged; the right front fender was dented, the rim of the headlight missing, and there was a large indentation on the hood of the automobile. (R. p. 59.) Scrapings were taken by these officers of a blue colored spot, which appeared to be a dye stain; a white substance, taken from the indented section, which appeared to be soap powder left on the surface of the car (R. pp. 60, 75); as well as a hair-like substance taken from the right front axle (R. pp. 61, 75, 79). Former Deputy Sheriff Guidry found a towel in the car, between the back seat and the seat cover, bearing dark brownish spots appearing to be blood. (R. pp. 80, 81, 92.) This evidence, along with the lunch pail, clothing and other articles, was brought to the sheriff's office, whence they were to be sent to the Department of Public Safety's laboratory in Baton Rouge. (R. pp. 61, 68.)

Deputy Prudhomme requested permission to bring this evidence to Baton Rouge, but was refused. (R. p. 69.) The evidence, along with Prudhomme's notes, was found to have been tampered with, and then subsequently disappeared. (R. p. 62.) Several inquiries were made by Deputy Milliet and Officer Folse regarding the disappearance of the evidence, all to no avail. (R. pp. 77, 149.) Trooper Folse said that this evidence and the investigation made would furnish definite proof as to the identity of the driver responsible for Mercer's death (R. p. 148), and further testified without objection that he heard there had been a payoff in the case. (R. pp. 149-150.) Deputy Sheriff Milliet testified that he had been fired as a result of the case. (R. p. 88.)

Paris Theriot gave conflicting explanations as to the cause of the damage to his automobile. He told Deputy Milliet and former Deputy Guidry that he had hit a cow with his car the day before. (R. pp. 76, 92.) He also told Trooper Folse and Deputy Prudhomme that he had collided with a truck which was proceeding in the same direction in which he was going. After the impact, he stated that he ran off the road for some 150-200 feet, and then pulled back onto the road. (R. p. 137.) The officers investigating the side of the highway saw no such markings. Trooper Folse testified that there was some evidence that a car had run off the highway, but at that particular location the mud was so thick and wet that the only way the vehicle could have gotten back on the road was for it to have been pulled out. (R. p. 147.)

It was shown that Paris Theriot sold his interest in the automobile agency business to his brother, effective December 31, 1955, less than two weeks after this accident. (R. p. 37.) In addition, Theriot endorsed a note for one of his witnesses, Leo Terrebonne, in the amount of $20,000.00. (R. p. 161.) Under Rules 43(b) of the Federal Rules of Civil Procedure, the deposition of the defendant was offered in evidence out of the presence of the jury. The deposition shows that Theriot admitted running over two other individuals. (R. p. 166.) This evidence was ruled inadmissible by the trial judge, who stated that if such evidence came out, even without any prompting from any witness, the Court would immediately order a mistrial. The excluded evidence was then admitted for the record. (R. p. 167.)

PROCEEDINGS BELOW.

The jury returned a verdict for petitioner in the amount of $25,000.00, and judgment was entered on October 29, 1957, in conformity with the verdict. (R. p. 195.) In denying defendant's motion for judgment notwithstanding the verdict and motion for new trial, the district Court gave as its reasons the following: "No one who sat through this trial and heard the witness could reasonably come to any conclusion except the one the jury came to." (R. p. 197.)

The United States Court of Appeals for the Fifth Circuit reversed the judgment of the district Court and remanded the case with directions to enter a verdict for the defendant, "* * * unless plaintiff, within a time and under conditions to be fixed by the district judge, make a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." *Theriot v. Mercer*, 262 F. (2d) 754, 761 (1959).

In response to the appellate Court's mandate, petitioner presented the following evidence: a report by Dr. Ralph Snyder, safety engineer and accident analyst, made after a study of photographs of the defendant's damaged automobile, and ten depositions. The district Court denied petitioner's motion for a new trial for the reason that such evidence ". . . while persuasive, would be inadmissible in a new trial under the hearsay rule." (R. p. 230.) Granting petitioner's motion for rehearing, the district Court observed: "There isn't any question in my

mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man." (R. p. 236.)

Following petitioner's appeal, the United States Court of Appeals for the Fifth Circuit, *en banc*, with four judges dissenting, affirmed the lower Court's judgment. (R. pp. 247-269.)

SUMMARY OF ARGUMENT.

1. Under the Seventh Amendment to the Constitution of the United States, it is the function of the jury to find facts; once such a finding of fact is made, it cannot be re-examined by any Court. On the first appeal of this case the Court of Appeals redetermined facts and reversed a jury verdict for petitioner in contravention of this constitutional guarantee.

   Atlantic and Gulf Stevedores, Inc., v. Ellerman Lines, Ltd., 369 U. S. 355 (1962).

2. In addition to re-examining the facts found by the jury, the appellate Court held that the evidence was insufficient to support the verdict, despite the existence of a preponderance of competent, probative evidence adduced by petitioner.

   Dick v. New York Life Insurance Company, 359 U. S. 437 (1959).

3. On the second appeal of this case, the Court of Appeals held that evidence presented by petitioner in an effort to obtain a new trial following the reversal of the jury verdict, did not justify submission of

the cause to the jury. While the evidence was circumstantial, it established that facts were in dispute, warranting a resolution of such factual questions by the jury.

Schulz v. Pennsylvania Railroad Company, 350 U. S. 523 (1956);

Byrd v. Blue Ridge Rural Electrical Cooperative, Inc., 356 U. S. 525 (1956).

ARGUMENT.

I.

In Re-examining Facts Found by the Jury, and Reversing the Jury's Verdict, the United States Court of Appeals for the Fifth Circuit Violated the Mandate of the Seventh Amendment.

As Judge Rives observed in his dissenting opinion herein, ". . . the most practical and effective safeguard of liberty and justice is the right of trial by jury." (R. p. 254.)[1] To secure this right, the Seventh Amendment to the United States Constitution was enacted, specifically forbidding judicial re-examination of facts "tried to a jury."[2] Without such a prohibition, a jury trial can have

[1] In **Parsons v. Bedford, Breedlove & Robeson**, 21 U. S. (8 Pet.) 433 (1830), this Court declared:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana."

[2] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court in the United States, than according to the rules of the common law." U. S. Const. amend. VII.

no binding force, and the jury's deliberations have no significance.

Stemming the tide of resistance to the sanctity of the jury verdict, this Court, in countless decisions, has demonstrated an unyielding commitment to the constitutional guarantee embodied in the Seventh Amendment, which it has zealously enforced by the granting of certiorari and the reinstatement of jury verdicts overturned by state and federal courts.[3] Illustrative of these decisions is *Atlantic and Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U. S. 355, 358-359 (1962), in which this Court distinguished the function of the jury from that of the appellate Court as follows:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than a District Court can predetermine them."

The impropriety of reversals of jury findings in cases involving recovery under the Federal Employers' Liability Act, 45 U. S. C., §§ 51, *et seq.*, has claimed this Court's attention on three recent occasions. *Basham v. Pennsylvania Railroad Company*, 372 U. S. 699 (1963); *Harrison v. Missouri Pacific Railroad Co.*, 372 U. S. 248 (1963); *Gallick v. Baltimore & Ohio Railroad Co.*, 372

[3] See Annot., **The Supreme Court's Review of Sufficiency of Evidence in Actions Under the Federal Employer's Liability Act**, 4 L. Ed. (2d) 1787 (1959), and the dissenting opinion of Judge Clark, Chief Judge of the Court of Appeals for the Second Circuit, in **Filipek v. Moore-McCormack Lines**, 258 F. (2d) 734 (2d Cir. 1958), in which over twenty cases are cited as examples in which this Court granted certiorari in order to restore jury verdicts.

U. S. 108 (1963). In all of these decisions, it was found that the invasion of the jury's province of fact finding was unwarranted. In the *Gallick* case, petitioner sustained injury resulting from a bite of an insect allegedly attracted to a fetid pool allowed to remain near the work site by respondent. The Court of Appeals for the state of Ohio found the evidence insufficient with respect to the causal connection between the railroad's negligence and the insect bite, and overturned petitioner's jury verdict. This judgment was reversed by this Court, relying on the rule of *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29 (1944),[4] to the effect that appellate courts should not search the record in an attempt to find conflicts in the evidence, and thereafter take the case from the jury.[5] Moreover, the Court of Appeals' finding that direct evidence was needed concerning the origin of the offending insect in the pool was held to be erroneous.

Petitioner urges that in the case at bar the United States Court of Appeals for the Fifth Circuit likewise was not empowered to re-examine facts previously found by the jury. In light of the well-established jurisprudence denying this capacity to an appellate Court,[6] it is submitted that the judgments below should be reversed.

[4] The applicability of **Tennant v. Peoria** to cases other than those arising under the Federal Employer's Liability Act is evidenced by citation of this case as authority for the amount of evidence needed to present a jury question in a suit under the Clayton Act, cited below, **Continental Co. v. Union Carbide**, 370 U. S. 690 (1962).

[5] This principle is cited with approval by the Court of Appeals for the Fifth Circuit in **Great American Insurance Company v. Cutrer**, 298 F. (2d) 79 (5th Cir. 1962).

[6] Decisions holding that facts found by a jury cannot be reweighed are these: **Rogers v. Missouri Pacific R. Co.**, 352 U. S. 500 (1957);

(Footnote continued on next page)

II.

The United States Court of Appeals for the Fifth Circuit Erred in Finding the Evidence Was Insufficient to Support the Jury Verdict.

On the first appeal of the instant case the United States Court of Appeals for the Fifth Circuit held that the evidence was not sufficient to support the jury verdict, or to justify submission of the cause to the jury, and, accordingly, the judgment was reversed, *Theriot v. Mercer*, 262 F. (2d) 754, 759 (5th Cir. 1959). While it is true that no eyewitness to the accident could be produced by petitioner, it is manifest that such evidence is not required. Further, the record reveals ample evidence from which the jury could draw inferences of respondent's negligence, proximately causing the death of petitioner's decedent. This evidence was not only convincing to the jury but to the trial judge and four judges of the Fifth Circuit Court of Appeals as well.

A similar finding of insufficiency of evidence to support a jury verdict was reversed by this Court in *Dick v. New York Life Insurance Company*, 359 U. S. 437 (1959). In that case the jury found the insured had met his death accidentally, and did not take his own life;

Ellis v. Union Pac. R. Co., 329 U. S. 649 (1947); **Lavendar v. Kurn**, 327 U. S. 645 (1946); **Eastman Kodak Company of New York v. Southern Photo Materials Company**, 273 U. S. 359 (1927); **Panama R. Company v. Bosse**, 249 U. S. 41 (1919); **Jefferson v. Taiyo Katun, K. K.**, 310 F. (2d) 582 (5th Cir. 1962); **State Farm Mutual Automobile Insurance Co. v. Canzoneri**, 297 F. (2d) 369 (5th Cir. 1961); **Johnson v. Hill**, 247 F. (2d) 110 (8th Cir. 1960); **Readnaur v. Commercial Standard Insurance Company**, 253 F. (2d) 907 (10 Cir. 1958); **Greyhound Corporation v. Dewey**, 240 F. (2d) 899 (5th Cir. 1957); **General Accident Fire & Life Assurance Corp. v. Zapel**, 231 F. (2d) 917 (5th Cir. 1956).

hence, the insurer was liable to petitioner as beneficiary under policies of insurance for double indemnity payments. Motions for directed verdict and judgment notwithstanding the verdict filed by the insurance company were denied by the trial judge. The Court of Appeals reversed, and dismissed the complaint, asserting that it was unable to believe that the decedent, an experienced hunter, could have possibly shot himself by accident, first by one barrel and then the other. Therefore, the question of whether the death was an accident was not a question of fact for the jury and should not have been submitted.

Summarizing the evidence, all of which was circumstantial, this Court held that the accidental discharge of the gun on another occasion, testified to by one of petitioner's witnesses, together with facts tending to show suicide had not been contemplated by the insured, supported the verdict, which must be reinstated. The error of the Court of Appeals was described in the following manner:

> "In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent that the shotgun would not fire unless someone or something pulled the triggers. Petitioner's evidence on this score could support a jury conclusion that the gun might have fired accidentally from other causes."
>
> * * * * * * *
>
> "After all the evidence was in, the district judge, who was intimately concerned with the trial and

> who has a first hand knowledge of the applicable state principles, believed the case should go to the jury."
>
> *Dick v. New York Life Insurance Company*, 359 U. S. at pp. 445-446.

Comparable holdings of this Court on this issue may be found in *Dennis v. The Denver & Rio Grande Western Railroad Co.*, 84 Sup. Ct. 291 (1963); *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325 (1960); *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107 (1959); *Harris v. Pennsylvania Railroad Co.*, 361 U. S. 15 (1959).

In both the *Dick* decision and the case at bar, the evidence, circumstantial in nature, owing to the fact the deaths were unwitnessed, satisfied the district judge as well as the jury. Judge Skelly Wright's reasons for judgment following the trial reflect this conviction: "No one who sat through this trial and heard the witnesses could reasonably come to any conclusion except the one the jury came to." (R. p. 197.) It should be noted that subsequent to the reversal of the judgment by the United States Court of Appeals, Judge Wright's opinion was unchanged, as disclosed by this statement:

> "There isn't any question in my mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man." (R. p. 236.)

In complete agreement with Judge Wright's opinion, Judge Rives, in his dissent, expressed his views as follows:

"In judging the sufficiency of the evidence to justify or support a verdict for the plaintiff, those issues can be narrowed to one: that is, was there substantial evidence from which the jury could reasonably conclude that the defendant, Paris Theriot, killed Byrd Mercer. This is true because the circumstantial evidence was overwhelming that Byrd Mercer was killed by some hit-and-run driver. Flight is evidence of guilt even in a criminal case, albeit the circumstances may be such as to make it weak evidence. Vick v. United States, 5 Cir., 1954, 216 F. (2d) 228, 233; see Wong Sun and James Wah Toy v. United States, U. S. October Term 1962, No. 36, decided Jan. 14, 1963, m/s, footnote 10. In civil cases of this type, the rule has been well expressed as follows: 'Every legitimate inference will be drawn against a hit-and-run driver, and an inference of an admission of negligence has been drawn against such a driver.' 61 C.J.S., p. 212, Motor Vehicles, § 511 (4).

"That the jury could reasonably conclude that a preponderance of the evidence proved that the defendant Paris Theriot killed Byrd Mercer, is shown, I submit, by the following catalogue of evidence. . . ." (R. pp. 256-257.)

Petitioner submits that the district judge and the four dissenting judges of the Court of Appeals were eminently correct; thus, the judgment of the majority of the appellate Court should be reversed.

III.

The United States Court of Appeals for the Fifth Circuit Erred in Finding Petitioner's Evidence Insufficient to Warrant Submission of the Case to the Jury.

In its opinion, the Court of Appeals, on the first appeal, held that there was a complete absence of any evidence of defendant's negligence (R. p. 249) and that "The second appeal does not require a reconsideration of the merits." (R. p. 252.) With respect to the evidence offered by petitioner in the district Court, pursuant to the mandate of the Court of Appeals, it was held that the evidence contained in the depositions, ". . . lacked probative force because it was incompetent, not because it was indirect or circumstantial evidence." (R. p. 254.) With respect to the accident analyst's report, the Court observed: "It is of doubtful admissibility because it comes close to taking over the jury's function of deciding ultimate facts. At best the report is merely cumulative." (R. p. 254.)

It is petitioner's position that the Court erroneously held that it was required to abide by its original decision that there was total absence of probative facts.[1]

[1] In regard to the possibility that the Court of Appeals' first decision constituted the law on the case, preventing an appellate court ordinarily from reviewing the correctness and arriving at a contrary conclusion on the question of whether the same body of evidence is sufficient to permit jury submission, **Lincoln National Life Insurance Co. v. Roosth**, 306 F. (2d) 110, 113 (5th Cir. 1962), Judge Rives' dissenting opinion points out relative to the **Roosth** case:

"In that case the first decision had reversed a judgment n. o. v. and remanded the case for a new trial. Upon the second appeal we affirm the judgment entered upon the

(Footnote continued on next page)

and, further, that the evidence presented by petitioner in response to the mandate presented a submissible case according to the decisions of this Court and other Courts of Appeal, including those of the Fifth Circuit.

The rule with respect to the determination of the presence of a jury question has been defined by this Court in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67-68 (1943), as follows:

> "Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, etc., R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-

jury's verdict on new trial. Our added reluctance to depart from the law of the case was, therefore, not inconsistent with the mandate of the Seventh Amendment. There is such inconsistency in the present case, and the constitutional mandate should prevail. In addition, I have emphasized the word "ordinarily" in the quotation from Roosth. The present case seems to me not an 'ordinary' one, not even a 'close' case, but one where the circumstantial evidence very clearly requires a submission of the issues for the jury's determination." (R. pp. 260-261).

Examples of reconsideration and reversals of former holdings are **Cochran v. M & M Transp. Co.**, 110 F. (2d) 519 (1st Cir. 1940), and **In Re Allied Electric Products, Inc.**, 194 F. Supp. 26 (D. C. N. J. 1961)

minded men may draw different inferences,' the case should go to the jury."[8]

A more recent statement of this principle appears in *Continental Co. v. Union Carbide*, 370 U. S. 690, 700-701 (1962), involving a suit by petitioner under § 4 of the Clayton Act, 15 U. S. C., § 15:

> "Undoubtedly all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusions as to the facts.' Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 35."

This Court, in *Schulz v. Pennsylvania Railroad Company*, 350 U. S. 523 (1956), applied this doctrine to a case consisting entirely of circumstantial evidence. Petitioner sued for the wrongful death of her husband, who

[8] To the same effect are these decisions: **Davis v. Virginian Railway Co.**, 361 U. S. 354 (1960); **Conner v. Butler**, 361 U. S. 29 (1959); **Magenau v. Aetna Freight Lines, Inc.**, 360 U. S. 308 (1959); **Baker v. Texas & Pacific Railway Co.**, 359 U. S. 227 (1959); **Berry v. United States**, 312 U. S. 450 (1941); **Texas & Pacific Railway Company v. Harvey**, 228 U. S. 319 (1913); **Kreigh v. Westinghouse Co.**, 214 U. S. 249 (1909); **Gardner v. Michigan Central Railroad**, 150 U. S. 349 (1893); **McQueen v. Navajo Freight Lines, Inc.**, 293 F. (2d) 530 (8th Cir. 1961); **Dickerson v. Shepard Warner Elevator Co.**, 287 F. (2d) 255 (6th Cir., 1961); **Williams v. National Surety Corporation**, 257 F. (2d) 771 (5th Cir. 1958); **Central Truck Lines, Inc., v. Lott**, 249 F. (2d) 722 (5th Cir. 1957); **Greyhound Corporation v. Dewey**, 240 F. (2d) 889 (5th Cir. 1957); **Western Production Company v. Yarbrough**, 234 F. (2d) 889 (5th Cir. 1956); **Roundtree v. Post**, 134 F. (2d) 340 (5th Cir. 1943); **James, Sufficiency of the Evidence and Jury Control Devices Available Before Verdict**, 47 Va. L. Rev. 218 (1961).

had been employed by respondent as a tug fireman. He was last seen at 1:25 A. M. walking in the direction of a tug, and several weeks later his body was discovered in the water near an adjacent pier; he had drowned, and there were no witnesses who could testify as to the attendant facts. It was shown that the decedent had to take care of four tugs by himself, and was obliged to step from one boat to another with no illumination except his flashlight. The district Court ordered the jury to return a verdict for defendant, since the only things that had been established were an accidental death and some evidence of negligence, but "not a shred of evidence connecting the two." The Court of Appeals affirmed, with the comment that while the evidence was "perhaps at most only doubtfully sufficient to present a jury question as to the defendant's breach of duty," it failed to show "where the accident occurred," or "that it was proximately caused by any default on the part of the defendant." This Court granted certiorari and reversed for these reasons:

> "In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a

possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found had the court allowed it to perform its function, but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be fairly drawn.'"

Schulz v. Pennsylvania Railroad Company, 350 U. S. 526.

The evidence in the instant case is likewise circumstantial, but this in no way lessens its probative value.[9]

[9] **Michalic v. Cleveland Tankers, Inc.**, 364 U. S. 325 (1960); **Rogers v. Missouri Pacific R. R. Co.**, 352 U. S. 500 (1957); **Holmes v. Goldsmith**, 147 U. S. 150 (1893); **The Robert Edwards**, 16 U. S. (3 Wheat.) 187 (1818); **Sitta v. American Steel and Wire Div. of U. S. Steel Corp.**, 254 F. (2d) 12 (6th Cir. 1958); **Korel v. United**, 246 F. (2d) 425 (4th Cir. 1957); **Gearhardt v. American Reinforced Paper Co.**, 244 F. (2d) 920 (7th Cir. 1957); **Pritchard v. Nelson**, 228 F. (2d) 878 (2nd Cir. 1955); **Williams v. Reading Co.**, 175 F. (2d) 32 (3rd Cir. 1949); **Pruitt v. Hardware Dealers Mut. Fire Inc.**, 112 F. (2d) 140 (5th Cir. 1940); **Sears Roebuck v. Peterson**, 76 F. (2d) 243 (8th Cir. 1935); **National Biscuit Co. v. Lutzky**, 22 F. (2d) 939 (6th Cir. 1927); **Penn Co. v. Zahner Metal Sash & Door Co.**, 273 Fed. 993 (6th Cir. 1921).

Petitioner submits that the Court of Appeals, on the first appeal of this case, erred in disregarding petitioner's evidence; it was admissible, and of overwhelming probative force. In the alternative, even if the evidence introduced at the trial must be ignored, the depositions and exhibits furnished in response to the mandate of the Fifth Circuit presented a question of fact which should have been resolved by the jury, in accordance with the principles stated in the foregoing cases.

On the second appeal, it was held that the evidence presented was incompetent, which, petitioner urges, was erroneous. Statements contained in the depositions to the effect that the witnesses heard the rim of an Oldsmobile was found near the body of the decedent, for which a sum of money was paid, as well as testimony regarding reports that the evidence gathered during the examination of defendant's car had been destroyed for a price paid did not violate the hearsay rule. Such statements were admissible for the purpose of establishing the fact that they were made; as explained in *6 Wigmore, Evidence*, § 1766, p. 180 (1940):

> "The classes of utterances thus exempt [from the hearsay rule] may be grouped under three heads:
>
> "3. Utterances used circumstantially as giving rise to indirect inferences, but not as assertions to prove the matter asserted." [10]

An example of the operation of this rule is found in *Scholle v. Cuban Venezuelan Oil Voting Trust*, 285 F.

[10] See **Aikens v. United States**, 282 F. (2d) 53 (10th Cir. 1960); **United States v. Gavagan**, 280 F. (2d) 319 (5th Cir. 1960); Note, 46 Iowa L. Rev. 210, 215 (1961); Note 40 Minn. L. Rev. 455 (1956); Note 5 Okla. L. Rev. 270, 273 (1952).

(2d) 318 (2d Cir. 1960), in which statements made to plaintiff, that certain individuals offered to lend him shares as collateral for a loan, were designated competent evidence which had been erroneously excluded, as shown by the following portion of the opinion:

> "Since the statements were relevant, they should have been admitted unless barred by some exclusionary rule. The court below excluded the evidence as hearsay, and no other reason for exclusion has been suggested. But the hearsay rule does not bar admission of the statements used circumstantially, since, when so used the primary focus of inquiry is whatever inferences can be drawn from the fact the words were spoken and not the truth of what was said."
>
> *Scholle v. Cuban Venezuelan Oil Voting Trust*, *supra*, at p. 321.

It is petitioner's position that these depositions were another link between Paris Theriot and the death of Byrd Mercer; as such, they were admissible, and furnished competent evidence from which the jury could draw reasonable inferences. Moreover, the photographs of defendant's car, together with the statements of the investigating officers concerning its appearance; the substances taken from it, as well as facts regarding the accident scene, were highly relevant, and presented facts upon which reasonable minds could differ, in accordance with the test for a jury question enunciated above. *Tiller v. Atlantic Coast Line R. Co.*, *supra*.

With respect to the report of Mr. Ralph Snyder, it is petitioner's contention that this expert's opinions are

admissible, and do not deprive the jury of its function of finding ultimate facts, as held by the Court of Appeals for the Fifth Circuit. (R. p. 254). On the contrary, this Court has held such testimony proper in *Transportation Line v. Hope*, 95 U. S. 297 (1897), in which it was explained:

> "It is not an objection, as is assumed, that he is asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness." [11]
>
> *Transportation Line v. Hope*, 95 U. S. at p. 298.

The determination of the Court of Appeals relating to the admissibility of evidence is unduly restrictive and in conflict with the liberal policy of reception of evidence set forth in Federal Rules of Civil Procedure, 43(a), together with the authorities cited above.

An analysis of the evidence adduced by petitioner at the trial on the merits, as well as the evidence introduced subsequent to the reversal of the jury verdict, shows beyond question that facts are in contest and conflicting inferences can be drawn. Given these circumstances, the

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[11] Standing for the same proposition are these decisions: **Texas & Pacific Railway Company v. Watson**, 190 U. S. 287 (1903); **Union Insurance Company v. Smith**, 124 U. S. 405 (1888); **Nordmeyer v. Sanzone**, 314 F. (2d) 202 (6th Cir. 1963); **Fequer v. United States**, 302 F. (2d) 214 (8th Cir. 1962); **Carlson v. Chisholm-Moore Hoist Corp.**, 281 F. (2d) 766 (2d Cir. 1960); **Kennelley v Travelers Insurance Company**, 273 F. (2d) 479 (5th Cir. 1960), **Peoples Gas Company of Kentucky v. Fitzgerald**, 188 F. (2d) 198 (6th Cir. 1951).

federal system, ". . . under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U. S. 525, 537 (1958). There being no foundation for the appellate Court's finding that no jury question was presented, the judgment below should be reversed.

CONCLUSION.

In the case at bar the Court of Appeals for the Fifth Circuit, on the first appeal, reversed a jury verdict; on the second appeal, the same Court refused to allow the case to be submitted to the jury. A clearer example of "judicial erosion" of the "essential guarantee of the Seventh Amendment," described by Mr. Justice Black, in his dissenting opinion, with whom Mr. Justice Douglas and Mr. Justice Murphy concurred, dissenting, in *Galloway v. United States*, 319 U. S. 372 (1943), could not be imagined.

In the simplest terms, the issue is whether or not the Seventh Amendment will be enforced, or is without meaning or significance, and should be judicially deleted from the Constitution. No better expression of the true import of this question could be cited than the following portion of Mr. Justice Black's opinion:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. . . . I shall continue

to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances." *Galloway v. United States*, 319 U. S. at p. 407.

It is respectfully submitted that this Honorable Court reverse the judgment below and reinstate the jury verdict in favor of petitioner; or, in the alternative, reverse and remand the case to the district Court for a new trial.

Respectfully submitted,

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PROOF OF SERVICE.

I, H. Alva Brumfield, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief on Mr. Stanley E. Loeb, counsel for respondent, by mailing a copy thereof, postage prepaid, addressed to his office at 318 Richards Building, New Orleans, Louisiana.

Dated this day of February, 1964.